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CASE NO. 92-71

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

JOSEPH SHIROKEY,
Petitioner,

v.

CITY OF CLEVELAND HEIGHTS,
Respondent.

Petition For Writ Of Certiorari
To The Ohio Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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August 10, 1992

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No. 92-71

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The salient point of the Ohio Supreme Court's holding in this case is that Petitioner Shirokey was afforded constitutionally adequate procedural due process under the State of Ohio's legal remedies and the City of Cleveland Heights' civil service rules when he was passed over for promotion in the City's Division of Fire. The Ohio Supreme Court's opinion expresses the holding that regardless of whether Petitioner has a property interest in a job promotion, neither the substantive nor procedural due process rights guaranteed by the Fourteenth Amendment were violated.

Petitioner concedes that a substantive due process violation is not involved in this case. Therefore, when this case is properly analyzed under the *Mathews v. Eldridge,* 424 U.S. 319 (1976) test to determine what procedural safeguards the Constitution requires in a given case, as was accomplished by the Ohio Supreme Court in its opinion, the result is that no predeprivation process would have been effective *under the facts of this case.* Additionally, the court properly found that Petitioner had a panoply of adequate remedies under state law to address the substantive law issue in this case -- i.e., whether the City's civil service rules regarding promotion are superceded by state statute which require Petitioner to be promoted. Such remedies include a declaratory judgment action, petition for a writ of mandamus, breach of contract action, an administrative investigation and hearing, and an administrative appeal to the state court system.

ARGUMENT

When all is said and done, Shirokey's Petition for Writ of Certiorari is asking the United States Supreme Court to review, under the guise of a §1983 claim, an *Ohio state law issue which was specifically and deliberately never reached by the Ohio Supreme Court*!!

For his first and primary reason as to "Why the Writ Should be Granted", Petitioner states: "The Ohio Supreme Court's Decision that the Petitioner Shirokey Did Not Have a Constitutionally Protected Property Interest in a Promotion as a Public Employee is Contrary to United States Supreme Court Precedent". [Petition for Writ of Certiorari, p. 9]. He then urges this Court to "scrutinize" the Ohio state civil service statutes "to determine whether they created a property interest"

and he directs the Court's attention to a comparison of Cleveland Heights civil service provisions and state civil service statutes. [Petition for Writ of Certiorari, p.11]

In emphasizing the state law issues, Petitioner masks the thrust of the decision of the Ohio Supreme Court which held that he had failed to state a cause of action. Shirokey's lawsuit was brought under 42 U.S.C. §1983. As recognized by the Ohio Supreme Court, the determinative issue was not whether Shirokey was deprived of a state law property interest, but rather whether he was deprived of due process of law under the Fourteenth Amendment so as to be entitled to 42 U.S.C. §1983 relief.

> The constitutional infringement under the Fourteenth Amendment is not the deprivation of a property interest *per se*, but is instead the *manner* by which the property is taken.

[Opinion of Ohio Supreme Court, *citing Cooperman v. Univ. Surgical Assoc., Inc.*, 32 Ohio St. 3d 191, 513 N.E.2d 288 (1987), at p. A10 of Petitioner's Appendix].

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*

[Opinion of Ohio Supreme Court, *citing Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (citation omitted), at p. A12 of Petitioner's Appendix].

The gravamen of Shirokey's claim is that the City's own civil service rules are invalid (indeed, he claims they have been invalid since 1936) and, therefore, he should have been appointed to the position of fire lieutenant under state civil service rules. He claims that the City's refusal to appoint him to this position violated state civil service law and, therefore, in turn violated the Fourteenth Amendment's guarantee of procedural due process. Petitioner's misunderstanding of the right to procedural due process is exemplified by his statement in his Petition at page 20 that "[i]n order for the city to give a [sic] predeprivation due process it only had to follow the law of the state".

In analyzing Shirokey's civil rights claim, the Ohio Supreme Court properly found it unnecessary to reach the issue of whether Shirokey had a property right or whether the City's civil service rules were valid. At the conclusion of its opinion, the Court stated:

> Accordingly, we express no view on the ultimate merits of Shirokey's claim except to hold that his complaint failed to state a claim under Section 1983 for the violation of his substantive or procedural due process rights.

[Opinion of Ohio Supreme Court, at p. A16 of Petitioner's Appendix]. Therefore, the only issue determined by the Ohio Court was whether Shirokey was denied any "process" to which he was "due" under the United States Constitution. Unless Petitioner can establish that his right to due process was violated, he has no claim under 42 U.S.C. §1983.

The Cleveland Heights City Manager, the City's appointing authority, does not have the authority to

declare City ordinances or rules invalid nor does any other board or commission of the City. Any predeprivation hearing by them on the issue raised by Shirokey would have been a totally vain act and, not surprisingly, Shirokey did not seek such a hearing.[1] The only appropriate "process" to resolve the issue raised by Shirokey -- i.e., the validity of the City's civil service rule under the City's charter and under *state* law -- is application to the state courts. The State of Ohio affords this "process" to Shirokey through several recognized types of actions: (1) a declaratory judgment action; (2) a petition for writ of mandamus; (3) a breach of contract action; and (4) an administrative appeal to the state courts. All of these are routinely used in Ohio by litigants to test the validity of municipal regulations and ordinances. *See State, ex rel. Bardo v. Lyndhurst*, 37 Ohio St. 3d 106, 524 N.E.2d 447 (1988) (petition for writ of mandamus); *Lynch v. Tiffenbach*, 14 Ohio App. 3d 174, 470 N.E.2d 445 (1984) (declaratory judgment and injunction); *Taylor v. City of Middletown*, 58 Ohio App. 3d 88, 568 N.E.2d 745 (1989) (appeal from decision of civil service commission). All of these remedies were available to Petitioner Shirokey and afforded him ample due process to raise any and all claims had he chosen to avail himself of them.

An excellent case illustrating the procedural avenues afforded by Ohio law in an almost identical situation to that of Petitioner Shirokey is *State, ex rel. Firefighters v. East Cleveland*, 40 Ohio St. 3d 222, 533 N.E.2d 282 (1988). In the *East Cleveland* case, two firefighters sought to compel the mayor of the city to

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[1]The Ohio Supreme Court, however, recognized Petitioner's right to request an investigation and hearing by the City's Civil Service Commission pursuant to City Codified Ordinance §137.18. (*See* p. A15 of Petitioner's Appendix).

promote them to the position of lieutenant. The mayor had refused to make the appointments, claiming he was governed by the city's ordinances. Like Petitioner, the firefighters claimed that the ordinances were invalid under state law because the appointment process was not set forth in the city's *charter* and the mayor, therefore, had a duty to make the appointments under state civil service rules. The firefighters and their union filed a petition for writ of mandamus directly in the state court of appeals to require the mayor to make the appointments under state law. The court of appeals denied the writ after finding that the city's ordinances had been validly enacted under the charter and therefore superceded state law. The Ohio Supreme Court affirmed.

Not surprisingly, Shirokey has never articulated the due process to which he was entitled and of which he was deprived when the City allegedly "took" his property interest without due process of law. The Petition for Writ of Certiorari mentions, at page 13, that *if* Shirokey had been promoted (which he was not) and *if* the City Manager had demoted him (which he did not), he would have been entitled to a hearing after such a demotion. This required "process" would take place only if Shirokey had been promoted and later demoted and has absolutely nothing to do with the issue before the Court.

The Ohio Supreme Court's opinion which is the subject of Shirokey's Petition for Writ of Certiorari is absolutely on target in its analysis and is consistent with the holdings of this Court and the Sixth Circuit Court of Appeals. The Ohio Supreme Court first recognizes that Section 1983 is not a substitute for state remedies and may only be invoked when a *federal right* is violated.

[Opinion of Ohio Supreme Court, at pp. A6 and A7 of Petitioner's Appendix, *citing Monroe v. Pape*, 365 U.S. 167 (1961) and *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (citations omitted)]. It then addresses the issue of whether the right to a promotion rises to the level of a "fundamental" interest protected by substantive due process and it determines that it does not. [Opinion of Ohio Supreme Court, at pp. A8 - A9 of Petitioner's Appendix, *citing Bowers v. Hardwick*, 478 U.S. 186, 191-94, *reh'g denied*, 478 U.S. 1039 (1986) and *Michael H. v. Gerald D.*, 491 U.S. 110, 122, *reh'g denied*, 492 U.S. 937 (1989)]. Finally, the Court looks at a potential procedural due process claim and determines that "predeprivation process" would make no sense in the Shirokey situation and that the post deprivation remedies available were constitutionally adequate. [Opinion of Ohio Supreme Court, at pp. A11 - A16 of Petitioner's Appendix, *citing Zinermon v. Burch*, 494 U.S. 113, 125, 127 (1990) and *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (citations omitted)].

Petitioner Shirokey states three (3) reasons as to why the writ should be granted. The following deals, in turn, with each of Petitioner's assertions:

First, Petitioner asserts:

> The Ohio Supreme Court's decision that the Petitioner Shirokey did not have a constitutionally protected property interest in a promotion as a public employee is contrary to United States Supreme Court precedent.

[Petition for Writ of Certiorari, p. 9].

This "reason" is a total red herring. The Ohio Supreme Court never determined that Shirokey did not have a constitutionally protected property interest in a promotion. While the Court appropriately did not address the issue,[2] it did hold that even if he did have a property interest in the promotion, he would be required to establish a violation of due process in order to state a claim under 42 U.S.C. §1983. The Court's opinion very properly dealt exclusively with Shirokey's failure to establish a violation of his right to due process under the Fourteenth Amendment.

Second, Petitioner asserts:

> The Ohio Supreme Court's decision that the Petitioner's complaint failed to state a claim upon which relief can be granted under 42 U.S.C. §1983 for the violation of his procedural due process rights is contrary to the precedent of the United States Supreme Court.

[Petition for Writ of Certiorari, p. 16].

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[2]The Ohio Supreme Court has never held that a job promotion is a property right in Ohio. Other Ohio courts, however, have held that there is not a property interest in a promotion. *E.g., Lynch v. Tiffenbach*, 14 Ohio App. 3d at 178. Moreover, City Codified Ordinance §137.11 would require Petitioner to serve a probationary period in the promoted position during which he could be demoted at anytime without a right of appeal. (*See* City Codified Ordinance §137.11 at Appendix, p. A1). A probationary employee does not have a constitutionally protected property interest in his position. *See, e.g., Matulin v. Village of Lodi*, 862 F.2d 609, 615-16 (6th Cir. 1988); and *Hill v. Gatz*, 63 Ohio App. 2d 170, 176, 410 N.E.2d 1268, 1272 (1979). It is only logical that an *applicant* for a position, such as Petitioner Shirokey, can have no greater property interest by virtue of being an applicant than he would have in the position itself. *See, e.g., Ratajack v. Bd. of Fire and Police Commissioners of City of Calumet*, 729 F. Supp. 603, 607 (N.D.Ill. 1990).

Petitioner's argument under his second "reason" focuses primarily upon *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984); and *Zinermon v. Burch*, 494 U.S. 113 (1990). He argues that under these cases predeprivation due process is required, but he, again, fails to divulge what type of meaningful predeprivation due process could have been provided. Instead, he rails against the City for its "invidious legislation" [Petition for Writ of Certiorari, p. 19] -- presumably referring to the City's civil service rules -- and once more refers to state hearing requirements after demotion *if Shirokey had been promoted to the probationary position he was seeking.*

In point of fact, the reasoning of the U.S. Supreme Court in *Parratt*, 451 U.S. 527, *Hudson*, 468 U.S. 517, and *Zinermon*, 494 U.S. 113, is totally consistent with the reasoning and analysis of the Ohio Supreme Court in the present case. In each of these cases the essential issue was whether the process provided by the state was constitutionally adequate. In each case, the Court examined the facts of the particular situation to determine what procedural protections the Constitution requires. In *Zinermon*, the Court states: "Due process, as this Court often has said, is a flexible concept that varies with the particular situation." 494 U.S. at 127. The *Zinermon* Court goes on to state that "*Parratt* and *Hudson* represent a special case of the general *Mathews v. Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due simply because they are the only remedies the State could be expected to provide." *Id.* at 128.

The present case involves a dispute over which civil service rules govern -- the City's rules or the statutes of the State of Ohio. It is a purely legal issue --

not a factual issue -- which no administrator or administrative body has the expertise or authority to determine. It would be irrational for the City or the state to provide a predeprivation hearing where an administrator or administrative body would be called upon to determine the legal validity of the City's rules, ordinances and Charter provisions. Therefore, the Ohio Supreme Court held that the state's postdeprivation judicial remedies are all the process that is due *in this situation* which is consistent with the reasoning of the U.S. Supreme Court in *Parratt*, *Hudson*, and *Zinermon*.

The result in *Zinermon*, 494 U.S. 113, is, of course, different from the present case, but the reasoning is consistent. Darrell Burch, the respondent in *Zinermon*, "consented" to be committed to a mental institution for a substantial period of time without any hearing to determine whether he was mentally capable of voluntarily giving such consent. The Court held that committing Zinermon without a determination as to whether his consent was informed was a violation of his constitutionally protected right to procedural due process. 494 U.S. at 139. It based this holding upon a finding that predeprivation safeguards in the *Zinermon* situation would have value in guarding against the kind of deprivation Burch allegedly suffered. *Id.* at 133-139. In other words, a reviewing authority could well have determined before Burch was committed that under the *facts* presented in that case he was not mentally capable of giving informed consent.

Using the same reasoning and analysis, the Ohio Supreme Court in the present case determined that a predeprivation hearing for Shirokey would have had no value in guarding against the kind of deprivation which

Shirokey alleges. The result is different from *Zinermon*, but the reasoning is consistent.

Other lower court cases are instructive here. In *Meyers v. City of Cincinnati*, 934 F.2d 726, 731 (6th Cir. 1991), the constructive discharge from employment of an assistant fire chief where he was not given a post-deprivation hearing required by Ohio statute did not violate the procedural due process clause of the Fourteenth Amendment and, therefore, was not actionable under 42 U.S.C. §1983 since he could not attack the State's judicial process for correction of errors by the administrative agency.

Buclary v. Borough of North Hampton (E.D.Pa. 1991), 1991 U.S. Dist. LEXIS 9897 (Case No. 90-7950) (unreported) involved a municipal corporation in Pennsylvania which failed to give veterans preference to candidates on an eligible list for police officer as required by state statute and if given would have assured plaintiffs' appointments. The court held such failure did not deprive plaintiffs of procedural due process under the Fourteenth Amendment and, therefore, was not actionable under Section 1983.

> [I]t seems absurd to require the defendants to afford pre-deprivation process under these circumstances. This Court is reluctant to find that due process requires the borough to afford candidates some sort of notice and hearing prior to the borough's decision to hire a candidate to the exclusion of others.

(See a copy of case in the Appendix hereto, pp. A2-A29).

Also in *Woods v. City of Michigan City*, 940 F.2d 275, 284 (7th Cir. 1991) (J. Will, concurring) it is stated:

> [W]here state action does not depend on predicate facts, or there are no disputed facts (and no disputes about the application of rules or policies to particular facts), generally no hearing is required. The due process clause does not mandate procedure for its own sake. Due process of law means an opportunity to be heard sometimes in person, sometimes on paper, sometimes before the fact [citation omitted], sometimes after [citation omitted], in cases where there is something to be heard about.

A predeprivation hearing would not have served any useful evidentiary purpose in this case where a police officer detained a traffic misdemeanant in clear violation of state law.

Likewise, a predeprivation hearing would not have served any useful purpose in the case at bar.

Third, Petitioner argues:

> The Ohio Supreme Court's decision in this case is contrary to the laws of the United States and the precedent of the Supreme Court of the United States so as to have an adverse and chilling effect upon the rights of United States citizens who have a legitimate claim and attempt to bring an action under 42 U.S.C. §1983 in Ohio.

[Petition for Writ of Certiorari, p. 22].

Under his third "reason" Petitioner merely restates arguments made under "reasons" one and two above and states that denying Petitioner's claim would have a "chilling effect" on persons who might otherwise seek relief under 42 U.S.C. §1983.

This Court and the federal circuit courts around the country have indicated on numerous occasions that 42 U.S.C. §1983 was not intended to be a substitute for state remedies. This Court articulated its position on the issue in *Parratt v. Taylor*, 451 U.S. at 544, as follows:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701, 47 L.Ed. 2d 405, 96 S.Ct. 1155, 1160 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Likewise, Petitioner's reasoning "would make of the Fourteenth Amendment a font" of substantive state civil service law and municipal "home rule" law. To put a "chill" on the inclination of litigants to file almost any action against government under the cloak of 42 U.S.C. §1983 would not be contrary to sound public policy or the precedents of this Court.

CONCLUSION

Shirokey v. Marth involves primarily issues of Ohio state law dealing with the relationship, under the Ohio Constitution, of municipalities and state government and the complex concept of municipal "home rule". For reasons best known to his attorneys, Petitioner brought his claim under 42 U.S.C. §1983. The federal constitutional issues raised -- violation of due process -- are purely incidental to the central issues of the original case and the holding of the Ohio Supreme Court did not break new ground or take a position contrary to the precedents of this Court in finding that no claim was stated under 42 U.S.C. §1983. It is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

CITY OF CLEVELAND HEIGHTS CODIFIED ORDINANCE §137.11

137.11 APPOINTMENTS, PROMOTIONS AND PROBATION.

All appointments and promotions by the City Manager in the classified service of the City shall be for a probationary period of twelve (12) months, except that the probationary period for an original appointment to the classified position of Firefighter in the Division of Fire shall be for a probationary period of twenty-four (24) months. No appointment or promotion therein shall be final until the employee has served and completed his probationary period in a satisfactory manner. An employee of the classified service of the City so appointed or promoted shall be subject to removal as a new employee or demoted as a promoted employee by the City Manager at any time during the probationary period, without appeal to the Civil Service Commission, if the City Manager determines that services and performance of the employee during such probationary period are unsatisfactory. Appointments or promotions in the classified service of the City shall become final at the end of the probationary period.

JAMES BUCLARY, JOSEPH YORK and RICHARD SUPPAN V. BOROUGH OF NORTHAMPTON and PAUL KUTZLER

Civil Action No. 90-7950

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
1991 U.S. Dist. LEXIS 9897

July 15, 1991, Decided
July 17, 1991, Filed

COUNSEL: [*1]

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JUDGES: Edward N. Cahn, United States District Judge.

OPINION BY: CAHN

OPINION: MEMORANDUM

The plaintiffs commenced this action pursuant to 42 U.S.C. § 1983 n1 alleging that the defendants denied them employment with the Borough Police force in a manner violative of their federal constitutional rights.

Richard Suppan also brought a pendant state claim alleging defamation on the part of both defendants. The defendants now move for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

I. BACKGROUND

Before advancing to the plaintiffs' claims, some background concerning the Borough's hiring process is necessary for an understanding of the dispute. When the Borough Council ("Council") decides to hire a police officer, it requests a certified list of three eligible candidates from the Borough's Civil Service Commission ("Commission"). If the Council chooses to appoint someone for a vacant position, the appointment must be from the certified list. The Commission generates lists of eligible candidates through an application process in which candidates are tested and ranked. [*2] The Commission's testing process requires the applicants to undergo oral and written examinations. The Commission then marks and subsequently averages the examinations to obtain raw scores by which the applicants are ranked from highest to lowest. The Pennsylvania Veterans' Preference Act n2 ("V.P.A.") entitles any veterans of the United States military to have ten extra "preference points" added to their scores before being ranked. Generally, applicants must then take a pass/fail psychological examination which the applicants must pass to continue their eligibility. Thus, when the Borough Council requests a certified list, the Commission forwards to the Council the names of the three highest-ranked applicants on the eligibility list.

- - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - -

n1 Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [*3]

n2 51 Pa. C.S. §§ 7101-04.

- - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - -

The plaintiffs James Buclary ("Buclary"), Joseph York ("York"), and Richard Suppan ("Suppan") are Pennsylvania residents. The defendant Borough of Northampton ("Borough") is a municipal corporation organized under the laws of Pennsylvania and located in Northampton County, Pennsylvania. The defendant Paul Kutzler ("Kutzler") at all relevant times was the Mayor of the Borough of
Northampton.

In early 1990, two vacancies arose in the defendant Borough's police force. The Borough then requested a certified list of eligible candidates from the Commission. On or about February 22, 1990, the plaintiffs took the civil service examination, and each claimed to be "veterans" as contemplated by the Veterans' Preference Act. The plaintiffs each had the ten "preference points" added to their examination results, and the top five applicants, ranked In order, were: (1) York; (2) Suppan; (3) Buclary; (4) Mullner, John J.; (5) Kadingo, Brian D.

The plaintiffs subsequently took a psychological examination, which each plaintiff passed. The Commission erroneously disqualified Suppan and [*4] removed him from the eligibility list, because it was the Commission's belief that Suppan failed this test. Zarayko Affidavit, para. 11. The Commission eventually rectified this error upon Suppan's appeal on November 27, 1990.

On or about April 19, 1990; the Commission supplied the Borough Council with a certified list of the three highest-ranked candidates. The candidates, listed and ranked in order, were York, Buclary and Mullner (who ranked third because of Suppan's erroneous disqualification). The Borough appointed Mullner to the position. Similarly, on May 10, 1990, the Commission generated a second certified list. The candidates, listed and ranked in order, were York, Buclary, and Kadingo. The Borough filled the second vacancy with Kadingo.

The plaintiffs now claim that they have a legal entitlement to the patrol officer positions by virtue of their placement on the eligibility list, and that the defendants denied them these positions in violation of the V.P.A. and without due process of law. The plaintiffs also claim that the defendants refused to hire them because they were not born and raised in the Lehigh Valley or in the Borough of Northampton. Richard Suppan also claims [*5] damages for defamation, alleging that the defendants intentionally caused the publication of statements that Suppan had failed his psychological examination. The plaintiffs now seek: compensatory damages from both defendants for emotional distress, loss of reputation, anxiety, humiliation and sleeplessness; punitive damages from the defendant Kutzler for an intentional, willful and wanton

invasion of rights; punitive damages from both defendants on the pendant state claim; and an order appointing them to the patrolman positions with "make whole" relief including seniority, back pay, benefits, Interest, costs and fees or, in the alternative, compensatory damages for loss of past and future income and benefits.

II. DISCUSSION

It, is important to note that all three plaintiffs are not similarly situated. Because the Commission did not certify Richard Suppan to the Council, the Council had no authority to hire him. As a result, Suppan's claims are slightly more involved than those of the other plaintiffs, and this court will consider them separately where necessary.

A. Standard for Summary Judgment

Summary judgment is appropriate where "the pleadings, depositions, answers to [*6] interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of "showing -- that is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Vines v. Howard*, 676 F. Supp. 608, 610 (E.D. Pa. 1987). The non-moving party must then go beyond the pleadings to "establish the existence of each element on which it bears the burden of proof." *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3rd Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S. Ct. 1313 (1991),

because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. In deciding the defendants' motion for summary judgment, this court must view the facts in the light most favorable to the plaintiffs, *Lyons v. U.S. Marshals*, 840 F.2d 202, 204 (3rd Cir. 1988), [*7] drawing all inferences and resolving all conflicts in their favor. *Gans v. Mundy*, 762 F.2d 338, 340 (3rd Cir. 1985), *cert. denied*, 474 U.S. 1010 (1986).

B. The Plaintiffs' Due Process Claims

The plaintiffs allege that the Pennsylvania Veterans' Preference Act gives them a "legal entitlement" to the police officer positions and that the defendants' "refusal to hire all three plaintiffs deprives each plaintiff of his constitutional right to substantive due process." Complaint, paras. 25-26. Construing the plaintiffs' claims liberally, this court finds that the complaint alleges both procedural and substantive due process claims. Thus, this court will examine each in turn.

1. Procedural Due Process Claims of Buclary and York

The "procedural component" of the Due Process Clause protects against government effected deprivations of constitutionally protected "life, liberty, or property" interests without constitutionally adequate process. *Zinermon v. Burch*, 494 U.S. 113, _____, 108 L. Ed. 2d 100, 114-15 (1990). Buclary and York allege that the defendants deprived them of appointments to which they were legally entitled. [*8] Therefore, their claim depends on their having had a constitutionally protected "property" interest in the appointments. *Cleveland Bd. of*

Education v. Loudermill, 470 U.S. 532, 538 (1985); *Board of Regents v. Roth*; 408 US. 564, 576-578 (1972). If such a right exists, the defendants cannot deprive the plaintiffs of this right without "constitutionally adequate" process. *Zinermon*, 494 U.S. at _____, 108 L. Ed. 2d at 114 (1990); *Loudermill*, 470 U.S. at 538; *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978)

State law creates and defines property rights. *Loudermill*, 470 U.S. at 538; *Craft*, 436 U.S. at 9. Buclary and York claim that the V.P.A. gives them a property interest in the patrolman positions. n3 Therefore, this court must first examine the V.P.A. to determine the nature of the interests it creates. *Loudermill*, 470 U.S. at 538; *Roth*, 408 U.S. at 577; *Clark v. Township of Falls*, 890 F.2d 611, 617 (3rd Cir. 1989). The next determination is whether the interests rise to a "legitimate claim [*9] of entitlement" protected by the Due Process Clause of the Fourteenth Amendment. *Craft*, 436 U.S. at 9; *Clark*, 890 F.2d at 617.

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n3 The defendants argue that this court should abstain from considering the statute pursuant to the doctrine of *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941). Pullman abstention recognizes that in some exceptional cases, unsettled questions of state law require that this court defer to a policy of promoting comity with the state courts, a policy which directs the federal courts to "stay their hands, at least initially." *Hughes v. Lipscher*, 906 F.2d 961, 964 (3rd Cir. 1990). "Abstention is invoked to allow a state judiciary to construe statutes or statutory schemes which appear constitutionally problematic on their face, but which may be subject to a saving construction." *Georgevich v.*

Strauss, 772 F.2d 1078, 1091 (3rd Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1028 (1986). Although the abstention decision is within that court's discretion, there are three prerequisite elements that must be present in this case before this court considers it further:

(1) Uncertain issues of state law underlying the federal constitutional claims brought in the district court;
(2) Amenability of the state law issues to a state court interpretation that would obviate the need for, or substantially narrow, adjudication of the federal claims;
(3) Disruption of important state policies through a federal court's erroneous construction of state law.

Hughes; 906 F.2d at 964; *Beigenwald v. Fauver*, 882 F.2d 748, 750 (3rd Cir. 1989); *D'Iorio v County of Delaware*, 592 F.2d 681, 685-86, *overruled on other grounds, Kershner v. Mazurkiewicz*, 670 F.2d 440, 448 (3rd Cir. 1982) (en banc). Because the Veterans Preference Act does not present "uncertain issues of state law," this court finds that abstention is inappropriate.

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[*10]

Section 4(b) of the V.P.A., 51 Pa. C.S. § 7104(b), states:

Whenever any soldier possesses the requisite qualifications, and his name appears on any eligible or promotional list, certified or furnished as a result of any such civil service examination, the appointing or promoting power in making an appointment or promotion to a position shall give preference to such soldier,

notwithstanding, that his name does not stand highest on the eligible or promotional list.

(emphasis added). Although the Pennsylvania legislature originally enacted the V.P.A. in 1941, the grant of preference to veterans in civil service appointments/promotions has a longer history. The first relevant construction of a veterans' preference provision appears in *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 568, 3 A.2d 701 (1938). n4 The *Graham* court's consideration yielded this construction:

Our conclusion from these decisions is that, so long as the statute requires passage of the examination, a veteran may be constitutionally preferred over non-veterans whether the statute be mandatory or directory. In either case the minimum qualification for appointment is success [*11] in an examination. The provision that those in the first four of the eligible list shall be preferred must, however, be construed to be mandatory, with the exception that the appointing power need not select such veteran if it is found on a fair basis that he is morally or physically unfit to be employed.

Graham, 333 Pa. at 577, 3 A.2d at 706. The Commonwealth Court has recently reaffirmed this mandatory construction. In *Rasmussen v. Borough of Aspinwall*, 103 Pa. Commw. 109, 519 A.2d 1074, *appeal granted*, 516 Pa. 637, 533 A.2d 94 (1987), *appeal withdrawn*, March 9, 1988, the plaintiff, who was applying for a patrolman position, received the veterans' preference points and as a result ranked first out of the three candidates certified to the Borough Council by the civil service commission. Rasmussen was the only veteran on the list, but the Borough selected a non-veteran who ranked below Rasmussen. The Commonwealth Court reversed the

trial court's grant of summary judgment for the Borough and remanded it with directions to enter judgment in favor of Rasmussen. In reaching this decision, [*12] the *Rasmussen* court held that:

Section 7104(b), by use of the word "shall", commands Council to appoint the certified veteran if he or she is one of the three on the certified list. It is also clear that the Borough Code defers to the Veterans' Preference Act. n5 Section 1181 n6 of the Code reads . . . "[persons who are eligible] shall be given the additional credits and preference in appointment and promotion as provided by law."

Rasmussen, 103 Pa. Commw. at 113-14, 519 A.2d at 1076 (emphasis in original). Thus, Section 4 of the V.P.A. mandates that if the Borough appoints a police officer from a certified eligible list comprised of one or more otherwise qualified veterans as contemplated by the statute, the Borough must appoint a veteran.

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n4 The *Schmid* court construed the Third Class City Law, 53 P.S. § 12198-4407 (June 23, 1931). This section also provided that "preference in appointment shall be given."

n5 "We note that Sections 1181 and 1184 of the Borough Code were both originally enacted as a part of the Borough Code in 1947 and were re-enacted with substantially the same language in 1966. It is clear, therefore, that the legislature since 1947 intended that

the Borough Code recognize whatever the existing law in Pennsylvania is with regard to veterans' preference." (footnote in original). [*13]

n6 53 P.S. § 46181.

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Accordingly, the plaintiffs Buclary and York, by virtue of their inclusion on the certified list, have a "property" interest in the appointments. This court finds that these interests, as created and defined by the state, rise to the level of a "legitimate claim of entitlement" and, therefore, are "property" protected by the Due Process Clause. *See Loudermill*, 470 U.S. at 538-39 (statute providing for termination of civil service employees only for cause created a property interest in continued employment). Also, it is clear that the defendants' appointment of two non-veterans, under color of state law, functioned to deprive Buclary and York of their entitlements.

However, this court's inquiry into the plaintiffs' claim does not end here. The next step of the analysis is the determination of what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court has recently stated:

The constitutional violation [of procedural due process rights] actionable under § 1983 is not complete when the deprivation occurs; it is [*14] not complete unless and until the state fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process [was] provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards

built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon, 494 U.S. at _____, 108 L. Ed. 2d at 114. In *Matthews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court enunciated the factors this court must weigh to determine what protection due process requires:

First, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Governments interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. The Supreme Court has usually held that the [*15] Constitution requires some kind of notice or hearing prior to a deprivation of property. *Zinermon*, 494 U.S. at _____, 108 L. Ed. 2d at 115 (citations omitted). However, the Court has also recognized that, under certain circumstances, a postdeprivation remedy satisfies due process. *Parratt v. Taylor*, 451 U.S. 527, 538 (1981), *overruled on other grounds*, 474 U.S. 327 (1986). The *Parratt* rule does not function as an exception to the *Matthews* analysis. Rather, the *Parratt* rule recognizes that in certain situations, tortious deprivations of property may occur "as a result of a random and unauthorized act of a state employee . . . not a result of some established procedure." *Parratt*, 451 U.S. at 541. Because the state cannot predict "random and unauthorized" deprivations, the "value of predeprivation safeguards [are] negligible in preventing the kind of depri-

vation at issue." *Zinermon*, 494 U.S. at _____, 108 L. Ed. 2d at 116.

The plaintiffs urge that due process requires notice and an opportunity to be beard prior to the deprivation of their entitlements. n7 Applying the *Matthews* factors, this court finds that [*16] the private Interest affected is substantial -- the interest in obtaining employment and earning a livelihood. Second, the risk of erroneous deprivation is small. The Borough's appointment process probably effects a deprivation of a vested employment interest very rarely. This claim differs greatly from most property deprivation cases where the government act at issue involves procedures or functions designed to effect the deprivation. *See Loudermill*, 470 U.S. at 539 (termination procedures at issue effected a deprivation); *Zinermon*, 494 U.S. at ____, 108 L. Ed. 2d at 118 (admission to mental hospital effected a deprivation). This case involves hiring procedures which only under certain circumstances -- the presence of veterans on the certified list and the failure to appoint one effects an incidental *de facto* deprivation. This court has difficulty in thinking of an appropriate procedure that would provide candidates with notice and a hearing prior to an appointment; at least not one which is practical considering the small risk of incidental deprivation. Granted, any additional or substitute procedures could conceivably eliminate deprivations, but the administrative [*17] and fiscal costs would be disproportionately burdensome relative to the small number of erroneous deprivations.

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n7 The plaintiffs compare themselves to the police officers in *Gniotek v. Philadelphia*, 630 F. Supp. 827 (E.D.

Pa. 1986). In *Gniotek*, nine police officers were dismissed from the police force. The issue was whether the predeprivation process afforded to the plaintiffs was constitutionally adequate. Holding that it was, Judge Broderick noted that the city had afforded notice and explanation of the charges, an opportunity to respond, and a post-termination hearing. *Gniotek*, 630 F. Supp. at 834. However, *Gniotek* is easily distinguishable. First, this court declines to consider the plaintiffs as public employees with a property interest in their continued employment. *See Gniotek*, 630 F. Supp. at 833; *see also Loudermill*, 470 U.S. 538-39 (public school employees have a property right in continued employment which requires predeprivation process). Second, *Gniotek* involved the adequacy of termination proceedings that function to effect a deprivation; this case involves hiring procedures which incidentally (whether intentionally, arbitrarily or inadvertently) caused a deprivation.

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[*18]

Nonetheless, the Fourteenth Amendment requires that the plaintiffs receive constitutionally adequate process. Initially, this court notes that Buclary and York have a meaningful postdeprivation remedy. In *Rasmussen v. Borough of Aspinwall*, the Commonwealth Court awarded the plaintiff a patrolman appointment with seniority and back pay. 103 Pa. Commw. at 116, 519 A.2d at 1077. Thus, *Rasmussen* would serve as direct precedent had the plaintiffs brought suit in state court. However, a meaningful postdeprivation remedy could serve to undermine the plaintiffs' claim only if predeprivation procedure is not a constitutional requirement. The *Parratt* rule addresses this contingency.

Because this case is of such a unique nature, the facts do not easily lend themselves to a *Parratt* analysis. In *Parratt* a state prison employee negligently lost a prisoner's sail-order hobby kit. The prisoner alleged that the state deprived him of his property without due process of law. The Supreme Court held that because the state could not predict "random and unauthorized" deprivations by an employee, it was not in a position to provide any predeprivation process. [*19] *Parratt*, 451 U.S. at 541. The Court found that the prisoner had an a constitutionally adequate postdeprivation tort remedy at state law, which was the only process the state could provide under those circumstances. *Id.*

The case at bar differs from *Parratt*, because this case does not involve an act by an employee which the Borough could not foresee; it involves acts of the Borough Council. The Council, through an established procedure, makes decisions to appoint some candidates to the exclusion of others. Therefore, "any erroneous deprivation will occur, if at all, at a specific, predictable point in the hiring process" -- when the Council makes its selection from the certified list. *Zinermon*, 494 U.S. at _____, 108 L. Ed. 2d at 121. Also, unlike the Court in *Parratt*, this court cannot say that predeprivation process is impossible. *Id.* Indeed, an analysis under *Matthews* suggests that a prior hearing might have prevented the deprivation. Lastly, the defendants' actions were not "unauthorized" in the sense that *Parratt* requires. The defendants were "authorized" to make final appointment decisions. The plaintiffs allege that the defendants [*20] did so with intentional and reckless disregard for their rights. Thus, "the deprivation here is 'unauthorized' only in the sense that it was an act not sanctioned by state law, but, instead, was a 'deprivation of constitutional rights by an official's abuse of his position.'"

Zinermon, 494 U.S. at _____, 108 L. Ed. 2d at 122. Accordingly, this case falls outside the scope of the *Parratt* rule.

However, as this court's analysis under the *Matthews* factors suggests, it seems absurd to require the defendants to afford predeprivation process under these circumstances. This court is reluctant to find that due process requires the Borough to afford candidates some sort of notice and hearing prior to the Borough's decision to hire a candidate to the exclusion of others. Although *Parratt* clearly does not control, *Parratt*'s underlying rationale suggests that due process does not require the aforementioned result.

The *Parratt* Court recognized that notice and an opportunity to be heard "must be granted at a meaningful time and a meaningful manner." *Parratt*, 451 U.S. at 540. Although the Fourteenth Amendment usually requires predeprivation process, the [*21] Court has consistently tempered this requirement with the caveat that "due process . . . is a flexible concept that varies with the particular situation." *Zinermon*, 494 U.S. ____, 108 L. Ed. 2d at 114-15. In *Parratt* the Court surveyed a long line of prior decisions which indicated that "the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful [postdeprivation process], satisfy the requirements of procedural due process." 451 U.S. at 539. This recognition significantly predates the *Parratt* rule. *Id.* (citations omitted). Sixty years ago, Justice Brandeis opened that "where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate." *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931);

Accord, Parratt, 451 U.S. at 537; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974).

Considering *Phillips'* language and the Supreme Court's consistent reliance on it, the Constitution does not necessarily [*22] require predeprivation process In the case at bar. An application of the *Matthews* factors indicates that the impracticality of providing predeprivation process in this case mandates the flexible approach the Supreme Court repeatedly advocates.

Although the *Parratt* rule does not control the instant case, *Parratt* does not preclude a finding that a meaningful postdeprivation remedy provides Buclary and York with constitutionally adequate process. The Commonwealth Court in *Rasmussen* directly addresses this type of deprivation and explicitly recognizes the equitable and "make whole" relief that the plaintiffs request. This court holds that *Rasmussen's* postdeprivation remedy satisfies the requirements of procedural due process and, therefore, Buclary and York have failed to state a § 1983 claim. Accordingly, there are no material facts to be disputed, and the defendants are entitled to summary judgment on this issue with respect to York and Buclary.

2. Procedural Due Process Claim of Suppan

Because Suppan was not certified to the Borough Council by the Civil Service Commission, his claim is of a different nature. Suppan alleges that although he actually passed the psychological [*23] test, the defendants did not inform his of his "failure" prior to the appointments of Mullner and Kadingo. Suppan affidavit, para. 5. Thus, he claims, the defendants failed to afford him notice and an opportunity to be heard on

the issue before disqualifying him. As noted above, Suppan appealed to the Commission and subsequently regained his position on the eligibility list. Thus, the issue is whether Suppan had a property right to placement on the eligibility list by ranking second after the written and oral examinations. Such a right, if it exists, can be found in the Borough's Civil Service Rules, Ordinance 941.

> The Civil Service Commission shall establish a list containing the names of those candidates still eligible for appointment to the position which is to be filled. The names of the candidates on the eligibility list shall be ranked according to the total scores of the candidates. From the eligible list, the Civil Service Commission shall certify to Borough Council . . . the names of the three candidates with the highest total scores if the position to be filled is any rank other than the chief of police.

Borough Ordinance No. 941, § 602(f) (emphasis added). [*24] The mandatory nature of this section suggests that the second-ranked Suppan had a right to remain on the eligible list contingent on his receiving an "passing grade" in pass/fail physical and psychological examinations. *Id.* at § 602(e). It is undisputed that Suppan passed these tests and was therefore eligible for appointment. In determining whether or not this ordinance creates a constitutionally-protected property right, this court finds that a Third Circuit Court of Appeals decision is directly applicable.

In *Stana v. School Dist. of Pittsburgh*, 775 F.2d 122 (3rd Cir. 1985), the plaintiff Stana was certified on a list used by the school district to select instructors. The *Stana* court held that the plaintiff had a legitimate claim

of entitlement to remaining on the eligible list based on testimony that the school district had a policy of keeping eligible persons on the list for "at least two years." *Id.* at 126. On the basis of this precedent, this court has little trouble finding that Suppan's eligibility gave him a legitimate claim of entitlement to remaining on the eligible list and to be subsequently certified to the Borough Council [*25] based an his test ranking.

The next question is whether the defendants deprived Suppan of this entitlement without due process. It is undisputed that the Commission rectified its error at Suppan's November 1990 appeal, but Suppan claims that due process requires the Borough to afford him notice of his failure and an opportunity to be heard an the issue before he was removed from the eligibility list. Again, *Stana* is instructive. In *Stana*, a school district administrator removed the plaintiff from the eligibility list after learning that the plaintiff received a negative performance evaluation from another employer. Judge Sloviter held that the school district must afford Stana notice of the removal and an opportunity to address the negative evaluation. *Stana*, 775 F.2d at 129. An application of the *Matthews* factors dictates the same result here.

> It is clear that like the plaintiff in *Stana*, Suppan has a significant private interest in obtaining gainful employment. With respect to risk of erroneous deprivation, this court can give no opinion. It is not established in the pleadings or the affidavits whether the error resulted from a flaw in the [*26] test itself, an error in evaluating the results, or some clerical error. However, the value of administrative safeguards is clear. The Borough can avoid erroneous deprivations by notifying the

candidate that he or she failed the test and allowing the candidate to appeal the finding. Although the Borough affords candidates process in the form of a civil service appeal, this process is not so meaningful when it occurs after the candidate has lost two opportunities to be considered for appointment. Thus, the Borough's procedure for redress of these deprivations must occur for to the candidate's removal from the eligibility list. Accordingly, Suppan has stated a § 1983 claim for a violation of his right to procedural due process. Because the defendants have attempted no showing of an absence of any genuine issues of material fact, the defendants' motion for summary judgment is dented with respect to this claim.

3. Substantive due process

Generally, substantive due process claims must demonstrate that the plaintiff was deprived of a "right historically and traditionally protected against State interference." *Cruzan v. Director, Mo. Health Dept.*, 497 U.S. ____, _____, 111 L. Ed. 2d 224, 252 (1990) [*27] (Scalia, J., concurring); *Michael H. v. Gerald D.*, 491 U.S. 110, _____, 105 L. Ed. 2d 91, 105 (1989) (plurality opinion); *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986); *Moore v. East Cleveland*, 431 U.S. 494, 502-03, (1977) (plurality opinion). Public employment, however, is not a constitutional right. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273, (1979). Thus, the plaintiffs have no claim on that basis.

In *Zinermon v. Burch*, the Supreme Court mentions a "substantive component" of the Due Process Clause which bars "arbitrary, wrongful government actions" regardless of procedural adequacy. n8 494 U.S. at ____.

108 L. Ed. 2d at 114-15. However, "whether and when state created property interests invoke substantive due process concerns" has not been squarely addressed by the Supreme Court. *Reich v. Beharry*, 883 F.2d 239, 243 (3rd Cir. 1989). In *Regents of the Univ. Of Mich. v. Ewing*, 474 U.S. 214 (1985), the Court assumed arguendo that Ewing had a protected property interest in her continued enrollment in school and found that [*28] "even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of this record disclose no such action." 474 U.S. at 223.

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n8 The plaintiffs have not alleged "arbitrary and capricious" conduct on the part of the defendants. The plaintiffs allege a "reckless disregard" of their rights, and this court construes the plaintiffs complaint to allege "arbitrary and capricious." Complaint, para. 25.

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The circuit courts have taken different stances since the Supreme Court's decision in *Ewing*. Several circuit courts have interpreted *Ewing* to hold that an arbitrary and capricious deprivation of state-created entitlements implicates substantive due process concerns. *See Barnett v. Housing Authority of City of Atlanta*, 707 F.2d 1571, 1577 (11th Cir. 1983) (where property interest exists for the purposes of procedural due process, it also exists for substantive due process); *see also* [*29] *Moore v. Warwick Public School Dist. No. 29*, 704 F.2d 322, 329-29 (8th Cir. 1986) (substantive due process claim stated where "arbitrary and capricious state action" alleged

regarding an interest in continued employment); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 864 F.2d 1475, 1484-85 (9th Cir. 1989) (substantive due process is violated when property rights are subject to arbitrary or malicious use of government power). However, other circuit courts have been reluctant to allow substantive claims based an state-created property rights. *See Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 957 (7th Cir. 1988) (no substantive due process claim where a state-created property interest is at stake and the state affords an adequate remedy); *see also Schaper v. City of Huntsville*, 813 F.2d 709, 718-19 (5th Cir. 1987) (where claim is barred under *Parratt v. Taylor* because act complained of is "random and unauthorized," plaintiff cannot state a claim for a violation of substantive due process).

The Court of Appeals for the Third Circuit has been similarly reluctant and has given little direct guidance [*30] for this court's analysis. In *Reich v. Beharry*, Judge Stapleton held that "despite the importance of utility service to the maintenance of a minimally acceptable standard of living, an arbitrary and capricious termination of such service by a state actor does not give rise "to a substantive due process claim." 883 F.2d at 242: *See Ransom v. Marrazzo*, 848 F.2d 398, 411-12 (3rd Cir. 1988) (water and sewer service did not constitute a protected property Interest for the purposes of substantive due process); *see also Mauriello v. U. of Med. and Dentistry of N.J.*, 781 F.2d 46, 52 (3rd Cir.), *cert. denied*, 479 U.S. 818 (1986) (student dismissed with constitutionally adequate procedures failed to state a substantive due process claim). The *Mauriello* and *Reich* courts were hesitant to recognize substantive due process claims based on an interest that "bears little resemblance to the fundamental interests that previously

have been viewed as implicitly protected by the Constitution." *Mauriello*, 781 F.2d at 50 (*citing Ewing*, 474 U.S. at 239-40 (Powell, J. concurring)); [*31] *Reich*, 883 F.2d at 244. Similarly, the interests in this case bear little resemblance to any implicitly protected rights.

Thus, this court will dismiss the claim. Despite the vested nature of both the Buclary/York and Suppan entitlements, and with due regard to their important interests in obtaining gainful employment, this court declines to hold that arbitrary and capricious deprivations of these particular state-created property rights give rise to a substantive due process claim. Therefore, because the plaintiffs have failed to state a claim for a violation of substantive due process, it follows that there are no material facts to be disputed. Accordingly, the defendants are granted summary judgment an this issue with respect to all of the plaintiffs.

C. The Plaintiffs, Equal Protection Claim

The plaintiffs claim that the defendants denied them employment, because they were not "born and raised in the Lehigh Valley or Northampton, Pennsylvania." In support of this allegation, the plaintiffs have offered affidavits claiming that each plaintiff was told by either the Chief of Police or a Civil Service representative that he was not being hired because he was [*32] not a 'local' and that the Borough 'takes care of its own' and hires only local people. In their response to the defendants' motion, the plaintiffs argue both an impermissible burden on the right to interstate travel and impermissible residency requirements. n9

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n9 Initially, this court notes that the Borough has a codified residency requirement. Although the plaintiffs do not challenge it directly, this court notes that it is a prospective one which conditions only continued employment upon the establishment of residence in the Borough. Such requirements have been upheld as constitutional. *See McCarthy v. Philadelphia*, 424 U.S. 645 (1976).

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Generally, the right to interstate migration and travel is a basic federal constitutional guarantee, *Memorial Hospital v. Maricopia County*, 415 U.S. 250, 255 (1974), which "protects against any unreasonable burden on citizens who travel from state to state." *Philadelphia Lodge No. 5 v. City of Philadelphia*, 599 F. Supp. 254, 259 (E.D. Pa. 1984), [*33] *aff'd without published opinion*, 779 F.2d 43 (3rd Cir. 1985) (*citing Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969)). Because this right is fundamental, any abridgement of it triggers strict judicial scrutiny and, therefore, must be justified as necessary to promote a compelling governmental interest. *Memorial Hospital*, 415 U.S. at 253; *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court addressed the constitutionality of a one-year waiting period for the receipt of welfare benefits. The *Shapiro* Court held that the waiting period burdened the right "to migrate, settle, find a new job and start a new life." 394 U.S. at 629. *Memorial Hospitals*, 415 U.S. at 255. The defendants seek to distinguish durational residency requirement cases such as *Shapiro*,

because the "birthplace" discrimination alleged in this case would not burden the right to travel. The defendants argue that a person's birthplace is unalterable and, thus, does not affect interstate mobility as does an unreasonable durational [*34] residency requirement. This court disagrees.

Although the facts of *Shapiro* and its narrow holding are entirely distinguishable from this case, it is clear from *Shapiro* that the plaintiffs have an "unconditional personal right" to move from their state of birth and establish a life in another state. *Dunn*, 405 U.S. at 341 (*quoting Shapiro*, 394 U.S. at 643, (Stewart, J., concurring)). The discrimination alleged in this case functions to divide Borough residents into two classes: those born and raised in the Lehigh Valley and those who subsequently migrate there. Thus, assuming the plaintiffs' allegations are true, the discrimination acts as an uncodified residency requirement that the plaintiffs Buclary and York can never meet. The fact that the discrimination is based on an immutable characteristic such as state of birth does not serve to remove this case from the protection of the right to travel; to the contrary, it adds a certain measure of invidiousness which offends "the principle that individuals should not be discriminated against on the basis of traits for which they bear no responsibility." *Novotny v. Great American Federal Savings and Loan Ass'n*, 584 F.2d 1235, 1243 (3rd Cir. 1978), [*35] *vacated on other grounds*, 442 U.S. 366 (1979). *Accord, Frontiers v. Richardson*, 411 U.S. 677, 686-87 (1973).

Turning to the specific facts of this case, this court finds that the plaintiffs York and Buclary allege facts sufficient to state a claim for the violation of their right to travel. The defendant Borough's employment

application requests the applicant's city and state of birth, and the plaintiffs York and Buclary listed their places of birth as New York and New Jersey, respectively. The defendants passed over the higher-ranked, "non-local" plaintiffs and appointed Mullner and Kadingo, who were both born in Allentown, Pa. Therefore, there remain some genuine issues of material fact, particularly whether or not the defendants made the assertions concerning the alleged preference in hiring "local" candidates. Consequently, the defendants' motion for summary judgment with regard to the plaintiffs York and Buclary is dented.

With respect to the remaining plaintiff, this court notes that Richard Suppan was born and raised in Allentown, Pa. Because he is similarly situated to Mullner and Kadingo, he cannot claim that he was discriminated against [*36] because he was not a "local". Therefore the defendants' motion for summary judgment is granted with respect to Suppan.

D. Suppan's Defamation Claim

The plaintiff Suppan alleges that the defendants defamed him by issuing written and oral statements that he "failed" the psychological examination. The defendants assert that Suppan's pendant defamation claim is barred by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. §§ 8540-50. Under this statute, the plaintiff's claim is barred unless it falls under the "willful misconduct" exception to governmental immunity. Section 8550 waives immunity,

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that

the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct.

In the context of § 8550, "willful misconduct" is coextensive with the common law definition of "intentional tort". *Lancie v. Giles*, 132 Pa. Commw. 255, 261, 572 A.2d 827, 830 (1990). In his complaint Suppan alleges that the "defendants intentionally, [*37] maliciously, and recklessly caused . . . malicious, false, defamatory, slanderous and libelous statements to be published and circulated." Complaint, paras. 48-49. The plaintiff's allegations are sufficient to state a claim under the "willful misconduct" exception to governmental and official Immunity. Because the defendants have not demonstrated an absence of any genuine issues of material fact with regard to this claim, their motion for summary judgment on Suppan's defamation claim is denied.

An order follows.

ORDER

AND NOW, upon consideration of the defendants' motion for summary judgment, IT IS ORDERED that the motion,

1. with respect to the procedural due process claims of the plaintiffs Buclary and York, is GRANTED.

2. with respect to the procedural due process claim of the plaintiff Suppan, is DENIED.

3. with respect to the substantive due process claims of all plaintiffs, is GRANTED.

4. with respect to the equal protection claims of the plaintiffs York and Buclary, is DENIED.

5. with respect to the equal protection claim of the plaintiff Suppan, is GRANTED.

6. with respect to the plaintiff Suppan's pendant defamation claim, is DENIED.